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In the

Supreme Court of the United States

JAMES OBERGEFELL, *et al.*,

Petitioners,

vs.

RICHARD HODGES, *et al.*,

Respondents.

On Writ of Certiorari to the
United States Court of Appeals for the Sixth Circuit

BRIEF OF ROBERT J. BENTLEY, GOVERNOR OF ALABAMA, AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

David B. Byrne, Jr.
Legal Advisor to the Governor
Office of the Governor
Alabama Capitol, Ste NB-05
600 Dexter Avenue
Montgomery, AL 36130
(334) 242-7120 P
(334) 242-2335 F
david.byrne@governor.alabama.gov

Algert S. Agricola, Jr.*
Ryals, Donaldson & Agricola, PC
60 Commerce Street, Ste 1400
Montgomery, AL 36104
(334) 834-5290 P
(334) 834-5297 F
aagricola@rdafirm.com
**Counsel of Record*

(Additional captions and counsel listed on inside cover)

Counsel for *Amicus Curiae* Governor Robert J. Bentley

(Additional Case Captions)

VALERIA TANCO, *et al.*,
Petitioners,

vs.

WILLIAM EDWARD "BILL" HASLAM, *et al.*,
Respondents.

APRIL DEBOER, *et al.*,
Petitioners,

vs.

RICK SNYDER, *et al.*,
Respondent.

GREGORY BOURKE, *et al.*,
Petitioners,

vs.

STEVE BESHEAR,
Respondent.

(Additional Counsel for *Amicus Curiae* Governor Robert J. Bentley)

Adam J. MacLeod
5345 Atlanta Highway
Montgomery, AL 36109
(334) 386-7527
amacleod@faulkner.edu

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INTEREST OF THE *AMICUS CURIAE* [1]

Amicus curiae, as Governor of Alabama, is constitutionally vested with the supreme executive power of the State of Alabama. Art. V, § 113, ALA. CONST. (1901). He is constitutionally designated chief magistrate for the State of Alabama. *Id.* Further, the Governor is constitutionally required to "...take care that the laws be faithfully executed." Art. V, § 120, ALA. CONST. (1901).

With regard to the Governor's constitutional authority, the Alabama Supreme Court has stated:

> ... these express constitutional provisions, all of which are of course unique to the office of governor, plainly vest the governor with an authority to act on behalf of the State of Alabama and to ensure "that the laws [are] faithfully executed" that is "supreme" to the "duties" given the other executive-branch officials created by the same constitution. *See generally Black's Law Dictionary* 970 (8th ed. 2004) (defining a

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[1] The Clerk of this Court has noted on the docket the blanket consent of all Respondents to the filing of *amicus curiae* briefs. Written consent from counsel for Petitioners to the filing of this *amicus curiae* brief accompanies this *amicus curiae* brief. This brief of *Amicus Curiae* Governor Robert J. Bentley was not authored in whole or in part by counsel for any party to these cases. No such counsel or party has made a monetary contribution intended to fund the preparation or submission of this brief.

> "magistrate" as "[t]he highest-ranking official in a government, such as the king in a monarchy, the president in a republic, or governor in a state.–Also termed *chief magistrate*; first magistrate."). *See also Opinion of the Justices No. 179*, 275 Ala. 547, 549, 156 So.2d 639, 641 (1961): "The laws of the state contemplate domestic peace. To breach that peace is to breach the law, and execution of the laws demands that peace be preserved. The governor is charged with the duty of taking care that the laws be executed and, as a necessary consequence, of taking care that the peace be preserved."

Ex parte State of Alabama, 57 So.3d 704, 719 (Ala. 2010).

Further, in *Searcy v. Strange*, ___ F.Supp.3d ___, 2015 U.S. Dist Lexis 7776 (S.D. Ala. Jan. 23, 2015) and *Strawser v. Strange*, ___ F.Supp.3d ___, U.S. Dist Lexis 8439 (S.D.Ala. Jan. 26, 2015), the Court declared the Alabama Sanctity of Marriage Amendment, Art. I, § 36.03, ALA. CONST. (1901)[2], and the Alabama Marriage Protection Act, ALA. CODE § 30-1-19, unconstitutional, leading to a situation in which probate judges in some counties have refused to issue marriage licenses to same sex couples, or not at all, while probate judges in other counties issue marriage licenses to same- and opposite- sex couples. *See*, ALA. CODE § 30-1-9

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[2] The Sanctity of Marriage Amendment was approved by 81% of the voters in Alabama in 2006.

("Marriage licenses **may** be issued by the judges of probate of the several counties.") Moreover, on February 8, 2015, Alabama Supreme Court Chief Justice Roy S. Moore, as administrative head of the Alabama unified judicial system, issued an order to Alabama probate judges that they shall not issue or recognize a marriage license that is inconsistent with Alabama law. Then on March 3, 2015, the Alabama Supreme Court granted an original petition for the writ of mandamus commanding probate judges to cease issuing marriage licenses to same sex couples based upon its finding that Alabama's Sanctity of Marriage Amendment and Marriage Protection Act do not violate the U.S. Constitution. *Ex parte State of Alabama ex rel. Ala. Policy Inst.*, ___ So.3d ___, 2015 Ala. Lexis 33 (Ala. Mar. 3, 2015). Thus, the Governor has a direct and constitutionally-based interest in the outcome of these cases.

SUMMARY OF ARGUMENT

Marriage equality does not exist in the United States. It cannot be made to exist in law without destroying the rights of children to be connected to their biological parents. No State can afford to do that. Even those States that have extended legal recognition to same-sex couples continue to distinguish between marriage and same-sex "marriage." The reason is plain: Marriage is a natural reality that States *must* distinguish from all other forms of human sociability, including same-sex relationships, for the purpose of securing the rights and well-being of children.

By contrast to marriage, same-sex "marriage" is a social experiment, a recent product of positive law. Its purpose is to affirm the sexual desires and choices of adults. This experiment threatens to obscure the natural rights and duties of marriage and parentage by communicating the message that only bigots think that children should be connected to both their father and their mother. And it imposes other costs on States and their citizens, especially the loss of religious liberty and other freedoms to distinguish between marriage and non-marital relations.

As this Court has recognized on several occasions, the fundamental right of marriage is the right of the intact, biological family to maintain its integrity, so that its members can honor their natural duties to each other. That right is among those unenumerated rights reserved to the people in the Ninth Amendment. Those rights and duties are fundamental to, and shape, all

state laws concerning marriage and family, including those incidents and privileges that are not part of the fundamental law, such as privileges of adoption and foster care. Over those laws States have reserved sovereignty through the Tenth Amendment.

States have compelling interests in shaping the privileges and incidents of marriage to secure the fundamental rights and duties of marriage, as States such as Alabama, Kentucky, Michigan, Ohio, and Tennessee have done. Those compelling interests include securing the rights of children to be connected to their biological parents, preserving distinct offices for mothers and fathers, and incentivizing and harnessing the benefits of kinship altruism.

To rule for the Petitioners would necessarily require United States courts to arrogate much of the States' sovereign power over marital relations. Whether this Court strikes down laws distinguishing marriage from same-sex couplings or requires all States to recognize same-sex "marriages" officiated in other States, the federal judiciary would get itself into the business of deciding which incidents of marriage and family law are valid in the new legal order and which are not. There is no basis in law, and therefore no neutral ground, on which to make those determinations. To rule for the Petitioners would convert the federal judiciary into an institution of moral disapprobation and will, and would compromise its integrity as an institution of law.

ARGUMENT

I. Marriage and Non-Marriage

Alabama law distinguishes between marriage and non-marriage. That distinction is fundamental in, and foundational to, the law of all fifty States and the United States as a Nation. That is why all fifty States, including those that issue marriage licenses to same-sex couples, continue to distinguish between marriage and same-sex unions for many purposes (*e.g.*, rights of biological parents, presumptions of paternity, presumptions of maternal custody, presumptions in favor of biological kin relations in foster care). Those incidents of marriage that distinguish between marriage and same-sex couplings are those that secure the fundamental rights of children to be connected to their biological parents, and the rights and duties of parents to care for their biological children.

The fundamental right of marriage is the right of the intact, biological family to maintain its integrity free from outside interference, as this Court has affirmed on several occasions. *Smith v. Organization of Foster Families*, 431 U.S. 816, 845 (1977) (Right to marry and reproduce older than Bill of Rights; source of right of family privacy not in law but in intrinsic human rights). As this Court has also affirmed, the integrity of the family is grounded on the monogamous union of a man and woman for life, the source of healthy children and the continuation of civilization. *Murphy v. Ramsey*, 114 U.S. 15, 45 (1885). The integrity of the biological family enables its members to fulfill the mutual duties that

each member of the family owes to the others. No State has created full marriage equality simply because the only way to make marriages and same-sex unions completely equal in law would be to eradicate from law the securities for children to be connected to their biological parents and biological parents to be connected to each other. Those rights and duties are fundamental to our laws and cannot lawfully be eradicated from the incidents of marriage.

This connection between marriage and the rights of children is what the United States District Court failed to notice when striking down Alabama's constitutional and statutory codifications of its fundamental laws governing the structure of marriage. The District Court in *Searcy v. Strange, supra*, erroneously assumed that marriage is a product of Alabama's positive laws and thereby supposed that by striking those positive enactments, it had issued a discreet, coherent judgment and order. But marriage is fundamental to nearly every area of state law. The laws that either expressly codify or presuppose the fundamental law of marriage as the union of a man and a woman include all of the statutes governing marital and domestic relations, ALA. CODE Title 30, and all the judicial decisions interpreting them; the presumption of paternity, ALA. CODE § 26-17-204, and other rules for establishment of the parent-child relationship, ALA. CODE § 26-17-201; laws governing consent to adopt, ALA. CODE § 26-10A-7(3), and all other laws governing adoption, ALA. CODE Title 26, Chapter 10A; termination of parental rights, ALA. CODE § 12-15-319; all laws that presuppose people of different genders occupying the positions of "father," "mother,"

"husband," and "wife," *e.g.* ALA. CODE § 40-7-17; laws governing intestate distribution, the spousal share, ALA. CODE § 43-8-41, and the share of pretermitted children, ALA. CODE § 43-8-91; legal protections for non-marital children, ALA. CODE § 26-17-202; registration of births, ALA. CODE § 22-9A-7, *J.M.V. v. J.K.H.*, 149 So.3d 1100 (Ala.Civ.App. 2014) (In disputes between unmarried parents as to surname of their child, parent seeking name change has burden to prove change is in best interest of child.); conflict-of-interest rules and other ethical standards prohibiting sexual relations, ALA. CODE § 45-28-70(f)(1), *Cooner v. Alabama State Bar*, 59 So.3d 29 (Ala. 2010) (Rule of Professional Conduct prohibiting lawyer from preparing an instrument giving the lawyer or a close relative of the lawyer any substantial benefit from a client, except where the client is related to the donee, includes relatives of the lawyer by marriage.); and laws presupposing biological kin relations, ALA. CODE § 38-12-2.

This compilation does not even include standards governing school curricula and accreditation, professional licensing and ethics, and many other state laws that implicitly or expressly define marriage by its natural contours as the union of a man and a woman. The District Court in *Searcy* has not explained which of these incidents of marriage it now deems unconstitutional. The same problem afflicts Petitioners' claims in these cases. This Court should resolve the question how much, if any, of the fundamental law of marriage it intends to eliminate from the law of the States.

If Petitioners are asking for full marriage equality—the exact same marriage institution with all of the same rights and duties—then the only way to achieve that is to remove from law the protections for children and biological parents. If, on the other hand, Petitioners are content to leave the fundamental rights of children in place, then they are not asking for all of the rights, duties, presumptions, and other incidents of marriage.

As this Court affirmed in *Windsor*, the States do have the power to define those *privileges* of marriage that do not threaten the fundamental rights and duties of marriage. Some States have exercised their "power in defining the marital relation" to confer upon same-sex couples "a dignity and status of immense import." *United States v. Windsor*, 133 S. Ct. 2675, 2692 (2013). That is a value very different from protecting the rights of children to have legal connections to their biological parents. Because the States retain "sovereign power" to define the privileges of marriage, *id.* at 2693, those States are within their right that use marriage law to confer approbation upon intimate same-sex relationships. That those States still differentiate between marriage and same-sex unions shows that Alabama is also within its right to continue to set apart the intact, biological family as marriage.

Indeed, there are compelling reasons for States to call marriages and same-sex unions by different names. Only those States that reserve the name "marriage" for unions that are marital in fact are able to make clear the unique importance and fundamental rights and duties

of the biological, parent-child relationship. To force States to redefine marriage is to obscure the non-fungible value of mother and father; it is to communicate the message that it is not important for fathers and mothers to remain committed to each other because no rational person would believe that having connections to both mother and father would make any difference for children.

Whatever the merits of using marriage laws to express official approval of the sexual relations of adults, the Court would sacrifice its neutrality as an institution of law and judgment were it to force the same-sex conception of marriage on those States that continue to set apart marriage—the union of man and woman out of which arises the biological family. The cost of redefining marriage is the sacrifice of important and enduring truths about the fundamental rights and duties of the father-mother-child relation, which the fundamental right of marriage has always secured.

II. Full, legal equality between married couples and same-sex couples cannot be achieved without eliminating the fundamental rights and duties of biological parents and kin and thereby jeopardizing the rights of children.

A. Full equality is not achieved by extending legal recognition to same-sex couples, as the laws of Massachusetts and similar States show.

States such as Massachusetts and New York continue to distinguish between marriage and same-sex relations for the same reason that Alabama does: to secure the duties of parents to their children and to each other for their children's sake. For example, Massachusetts retains in its statutes the presumption of paternity, identifying when "a man is presumed to be the father of a child," Massachusetts General Laws c. 209C, § 6, though that presumption cannot apply to a man-man "marriage" the same as it does to a real marriage. *Opinion of the Justices to the Senate*, 802 N.E.2d 565, 581 n.3 (Mass. 2004) (Cordy, J., dissenting). Massachusetts even applies the presumption to woman-woman "marriage" so long as both the biological father and the non-mother woman in the marriage consent. *Hunter v. Rose*, 975 N.E.2d 857, 861-62 (Mass. 2012). Yet, it would strain credulity to presume paternity by a woman married to a mother. See Adam J. MacLeod, *Fundamental Rights and Concessions of Privilege*,

available at http://works.bepress.com/adam_macleod/21/ at 1-2.

The incest prohibition in Massachusetts law, M.G.L. c. 272, § 17, is defined by its opposite-sex predicates. "No man shall marry his mother, grandmother, daughter, granddaughter, sister, stepmother, grandfather's wife, grandson's wife, wife's mother, wife's grandmother, wife's daughter, wife's granddaughter, brother's daughter, sister's daughter, father's sister or mother's sister." M.G.L. c. 207 § 1. "No woman shall marry her father, grandfather, son, grandson, brother, stepfather, grandmother's husband, daughter's husband, granddaughter's husband, husband's grandfather, husband's son, husband's grandson, brother's son, sister's son, father's brother or mother's brother." M.G.L. c. 207, § 2. Massachusetts also retains its polygamy prohibition, M.G.L. c. 207 § 4. These laws codify norms that presuppose that marriage is what it is in biological fact—the union of a man and a woman. See Sherif Girgis, Ryan T. Anderson, and Robert P. George, *What is Marriage?: Man and Woman: A Defense* (2012).

Recently, the high court of New York interpreted New York's incest prohibition in light of its rational basis that incest carries a risk of genetic defects in potential biological offspring. *Nguyen v. Holder*, 21 N.E.3d 1017, 1021-22 (N.Y. 2014). That rule also makes no sense if applied to same-sex couples. (The New York court also identified the State's interest in expressing its moral disapproval of incest, but it is difficult to see

how that rationale could survive this Court's ruling in *Lawrence v. Texas*, 539 U.S. 558 (2003)).

It is not difficult to perceive why Massachusetts, New York, and other States continue to distinguish between marriage and same-sex relations. Marriage is the only institution capable of solving the problem of establishing normative connections between fathers and their children. This problem was explained well more than a decade ago by a Justice of the Massachusetts Supreme Judicial Court: "Whereas the relationship between mother and child is demonstratively and predictably created and recognizable through the biological process of pregnancy and childbirth, there is no corresponding process for creating a relationship between father and child." Marriage fills the gap "by formally binding the husband-father to his wife and child, and imposing on him the responsibilities of fatherhood. The alternative, a society without the institution of marriage, in which heterosexual intercourse, procreation, and child care are largely disconnected processes, would be chaotic." *Goodridge v. Dept. of Public Health*, 798 N.E.2d 941, 995-97 (Mass. 2003) (Cordy, dissenting).

B. The only way to create full equality between marriage and same-sex relations would be to eradicate the fundamental rights of children to be connected legally to their biological parents, which governments have no power to do.

These facts, which have notably escaped the attention of the inferior tribunals that have decided the marriage question, reveal that full marriage equality is not something to be achieved by simply issuing marriage licenses to same-sex couples. It requires eliminating the distinct offices of man and woman, husband and wife, father and mother from the institution of marriage. The only alternative to distinguishing between marriage and same-sex unions in law—the only way to create full "marriage equality"—is to eliminate from law all of the incidents that secure children to both biological parents and that secure biological parents to each other. If same-sex couples must be treated exactly the same as married couples, then the law must eliminate those rights, duties, presumptions, and other incidents of marriage that protect the fundamental rights of children and the rights and duties of parents.

The law maintains distinct and non-fungible offices for father and mother because mothers and fathers are distinct and non-fungible in fact. Every child has a biological mother and a biological father, and only one of each. Marriage anneals the bonds between father

and mother, and ties that pair to the children to whom they owe natural duties.

Altering the jural relations within the biological family is not within the police powers of the State, much less the enumerated powers of the national government, because the rights of natural marriage and biological parenting are among "the basic civil rights of man. Marriage and procreation are fundamental to the very existence and survival of the race." *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942). This makes the distinction between marriage and non-marriage very much unlike distinctions based on race. While striking down posited statutes that added to natural marriage "distinctions drawn according to race," the *Loving* Court re-affirmed that marriage is oriented toward the bearing and rearing of children, that it is "fundamental to our very existence and survival." *Loving v. Virginia*, 388 U.S. 1, 12 (1967).

The fundamental right to marry is grounded in the fundamental duties of biological parents to each other and to their children, and the duties and rights of the child's extended kin relations. See Adam J. MacLeod, *Fundamental Rights and Concessions of Privilege*, available at http://works.bepress.com/adam_macleod/21/. To be clear, to affirm that the rights and duties of the biological family are fundamental does not entail that they are incorporated against the States through the Due Process Clause of the Fourteenth Amendment. It is simply to affirm that they emanate from sources of authority other than the State's sovereignty to enact positive laws. MacLeod,

Fundamental Rights and Concessions of Privilege, at *7. They are part of the fundamental law of the States and the Nation. See James R. Stoner, Jr., *Common Law and Liberal Theory: Coke, Hobbes, and the Origins of American Constitutionalism* 78-83 (1992). They are among the unenumerated rights denial of which is prohibited by the Ninth Amendment.

The biological family precedes the state; the state did not create it. *Meyer v. Nebraska*, 262 U.S. 390, 399-400 (1923). The rights and duties of the family arise out of the nature of marriage, "consisting in and springing from the union for life of one man and one woman in the holy estate of matrimony; the sure foundation of all that is stable and noble in our civilization." *Murphy v. Ramsey*, 114 U.S. 15, 45 (1885). Because the duties are grounded in nature and not the will of the lawmaker, the State has no power to reconstitute the fundamental rights and duties of the biological family. The complex of jural relations at the heart of marriage and family must remain beyond the reach of government power. As Justice Sotomayor has described one of these jural relations, the "biological bond between parent and child is meaningful," and the right of a biological parent is "an interest far more precious than any property right." *Adoptive Couple v. Baby Girl*, 133 S. Ct. 2552, 2574-75 (2013) (Sotomayor, dissenting).

Like other unenumerated rights secured by the Ninth Amendment, the right of marriage should be understood with reference to its common law contours, especially as specified in Blackstone's *Commentaries*. Jeffrey D. Jackson, *Blackstone's Ninth Amendment:*

A Historical Common Law Baseline for the Interpretation of Unenumerated Rights, 62 Oklahoma L.Rev. 167 (2010). For Blackstone, the most "universal relation in nature" is that between biological parent and child, and it proceeds from the first natural relation, that between husband and wife. 1 William Blackstone, *Commentaries on the Laws of England* 434 (University of Chicago Press (1979) (1765). The "main end and design of marriage" is to "ascertain and fix upon some certain person, to whom care, protection, the maintenance, and the education of the children should belong." *Id.* at 443. And those duties are duties of natural law. *Id.* at 435, 438-39. Positive law does not create the rights and duties, it only adds security to them (or not). The fundamental family laws of Alabama, Massachusetts, and the United States are thus specified by the common law understanding that marital and parental rights and duties are grounded in the nature of the man-woman marital relation, and therefore beyond the power of governments to alter. See generally, 2 James Kent, *Commentaries on American Law* 225-67 (Boston, Little, Brown & Co., O.W. Holmes, Jr. Ed., 12th ed. 1873) (1851); 1 Blackstone, *Commentaries* at 435-40.

That is why this Court has consistently linked the rights of marriage and parenthood, and has identified them as the fundamental right of mother and father to fulfill their natural duties to their biological children. The rights securing the biological family's integrity are "intrinsic human rights" that are deeply rooted in our Nation's "history and tradition." *Smith v. Organization of Foster Families*, 431 U.S. 816, 845 (1977), quoting

Moore v. City of East Cleveland, 431 U.S. 494, 504 (1977).

Failing to distinguish between marriage and non-marriage (including same-sex relations) obscures the fundamental rights and duties of the biological family. This highlights an ambiguity in the Petitioners' arguments. It is not clear whether they are asking for full equality between marriage and same-sex couplings or instead are content to leave the fundamental rights and duties of natural marriage in place. If they are content to leave those rights and duties in place, then States must be free to distinguish between marriage, which pertains to the father-mother-child triad, and non-marital committed unions, to which various privileges and incidents of marriage might be extended, or not.

III. The power to assign privileges and other incidents of marriage to relations that are like marriage is reserved to the States by the Tenth Amendment.

A. Different States exercise their sovereignty to regulate the family differently.

For the reasons just stated, to say that a new definition of marriage is required by the Constitution is too simplistic, just as it would be too simplistic to say that the matter is left entirely to the democratic processes. The fact is that the fundamental right of the biological family—father-mother-children—is

presupposed by the Ninth Amendment, while the privileges of marriage—presumption of paternity, adoption, recognition of same-sex and other loving groups, and other incidents of positive law—are left to State court adjudication and democratic processes within the States through the Tenth Amendment.

"Each state as a sovereign has a rightful and legitimate concern in the marital status of persons domiciled within its borders." *United States v. Windsor*, 133 S. Ct. 2675, 2691 (2013), quoting *Williams v. North Carolina*, 317 U.S. 287, 298 (1942) (hereinafter, "*Williams I*"). The States possess full power over marriage because the "Constitution delegated no authority to the Government of the United States" over marriage. *Windsor*, 133 S. Ct. at 2691, quoting *Haddock v. Haddock*, 201 U.S. 562, 575 (1906). Nor does the federal judiciary share power with the States to adjudicate the rights and duties of marriage and parentage. Federal courts have no power of *parens patriae*, no power of probate and divorce, and therefore no jurisdiction over the natural rights and duties of husband and wife and their biological children. *In Re Burrus*, 136 U.S. 586, 594 (1890); *Williams v. North Carolina*, 325 U.S. 226, 233 (1945) (hereinafter, "*Williams II*"). Relations between husband and wife, father and child, mother and child, simply "are not matters governed by the laws of the United States." *In Re Burrus*, 136 U.S. at 596.

To rule for the Petitioners would necessarily require United States courts to arrogate much of the States' sovereign power over marital relations. Whether this

Court strikes down laws distinguishing marriage from same-sex couplings or requires all States to recognize same-sex "marriages" officiated in other States, the federal judiciary would get itself into the business of deciding which incidents of marriage and family law are valid in the new legal order and which are not. To vest that power in the federal judiciary would be a "usurpation" of an essential attribute of state sovereignty. See *National Federation of Independent Business v. Sebelius*, 132 S. Ct. 2566, 2592 (2012).

To take just one example, laws governing gestational agreements (and other procreative activities not resulting from intercourse between a man and a woman) vary from State to State. Because same-sex couples cannot reproduce on their own, maternal surrogacy is intrinsically and necessarily connected to any new rights of same-sex couples to marry and have children. If two married men will have a constitutional privilege to enter into gestational agreements and egg donation contracts with women for the production of children, then the courts of the United States must necessarily require state officials to implement and enforce that privilege, often in contravention of state laws, and sometimes in tension with state laws designed to protect the rights of women and children. Article III judges will supersede state officials in their roles as officers of state family and probate laws.

One purpose of state sovereignty is to secure the liberties of citizens. *New York v. United States*, 505 U.S. 144, 181-82 (1992). Those liberties include the rights of children to be connected to their parents and

the rights of integrity of the biological family. "The definition of marriage is the foundation of the State's broader authority to regulate the subject of domestic relations with respect to the '[p]rotection of offspring, property interests, and the enforcement of filial responsibilities,'" *Windsor*, 133 S. Ct. at 2691, quoting *Williams I*, 317 U.S. at 298, which are rights and duties of "husband and wife, parent and child." *Windsor*, 133 S. Ct. at 2691, quoting *In Re Burrus*, 136 U.S. 586 (1890).

The States alone have power to regulate and adjudicate the legal relations of families because each State alone has jurisdiction over families domiciled within it. *Williams II*, 325 U.S. at 231-32. Marriage is not merely an *individual* right of an adult. Marriages are "social institutions" with their own complexes of jural relations—both rights and duties—which are located within particular States, and those States have particular interests in securing those rights and duties with the force of law and judgment. *Williams II*, 325 U.S. at 232. States cannot afford to ignore the reality of natural marriage and the biological family, and States have the strongest interest in privileging and reinforcing the natural rights and duties of fathers and mothers, to each other and to their children. After all, it is the States that deal with the consequences of non-marital childbirth, marital infidelity, divorce, deadbeat dads, exploitation of women and children to satisfy the desires of adults, and all of the other costs generated by selfish individuals who fail to fulfill their marital duties. When the right to marry is divorced from the duties of the natural family, the States and their people suffer.

Usurpation of state sovereignty would also threaten the autonomy of the States themselves. If this Court were to usurp state sovereignty over the family, then state officials would be commandeered into enforcement of the uniform privileges and incidents of the new national right of same-sex "marriage," or the incidents and privileges of other States' same-sex unions. In regulation of marriage and the family, the States would become "instruments of federal governance." *Printz v. United States*, 521 U.S. 898, 919 (1997).

No such expanded federal jurisdiction is required to secure the rights of natural marriage and the natural family. Protecting those rights against encroachment does not require federal governance of the family, it merely requires forbidding States to place on the family extraneous burdens, such as anti-miscegenation laws, *Loving v. Virginia*, 388 U.S. 1 (1967), and forced sterilization, *Skinner v. Oklahoma*, 316 U.S. 535 (1942). By contrast, a new right to same-sex "marriage" would be entirely a product of this Court's decision—positive law—and would require for its realization new privileges or alteration of existing privileges embedded throughout state law.

The fundamental marriage right is distinct from legal privileges of marriage, such as tax benefits, and the legal privileges of parentage, such as adoption. As the Eleventh Circuit has explained, "Unlike biological parentage, which precedes and transcends formal recognition by the state, adoption is wholly a creature of the state." *Lofton v. Secretary of the Dept. of Children and Family Services*, 358 F.3d 804, 809 (11th

Cir. 2004). Therefore, the practice of adopting is not a fundamental right, but rather a privilege created by state law. *Id.* at 811-15. Yet even that privilege is shaped and specified with reference to the fundamental rights and duties of the biological family. As this Court has observed, by operation of state laws, adoption is the "legal equivalent of biological parenthood." *Smith*, 431 U.S. at 844 n. 51. States have a compelling reason to shape the privileges of marriage consistently with the fundamental rights and duties of marriage, just as they have compelling reasons to leave those fundamental rights and duties in place.

Alabama, like Kentucky, Michigan, Ohio, and Tennessee, has chosen to affirm the millennia-old institution of marriage by preserving the fundamental rights and duties of natural marriage and shaping the privileges of marriage around marriage. The choice of those States to preserve marriage and codify it in law is grounded in the States' compelling interests to secure the rights of children to be connected to their biological parents, to preserve distinct offices for mothers and fathers, and to incentivize and harness the benefits of kinship altruism.

Preservation of marriage in law reflects an understanding of marriage as a unique form of sociability with its own intrinsic and instrumental goods. See Sherif Girgis, Ryan T. Anderson, and Robert P. George, *What is Marriage?: Man and Woman: A Defense* (2012); Patrick Lee and Robert P. George, *Conjugal Union: What Marriage is and Why it Matters* (2014).

It *also* reflects the instrumental value of marriage for harnessing kinship altruism, "the care that natural parents are inclined to give to their children because they have labored to give them birth and have come to recognize them as a part of themselves that should be preserved and extended." Don Browning and Elizabeth Marquardt, "*What About the Children? Liberal Cautions on Same-Sex Marriage*," in The Meaning of Marriage: Family, State, Market, and Morals 36 (Robert P. George and Jean Bethke Elshtain, eds., 2006). Parents have a "fundamental liberty interest" to direct the upbringing of their children in part because they have both the "high duty" and the inclination to raise their children well. *Troxel v. Granville*, 530 U.S. 57, 65 (2000), quoting *Pierce v. Society of Sisters*, 268 U.S. 510, 535 (1925). The presumptions of parental custody and authority rest on the recognition "that natural bonds of affection lead parents to act in the best interests of their children." *Parham v. J.R.*, 442 U.S. 584, 602 (1979). This is not to suggest that same-sex couples cannot be good parents, only that children should not be deprived of legal recognition of their natural parents.

Massachusetts and States like it use marriage law to promote a very different conception of marriage that takes sides on the moral question of what marriage is. A narrow majority of the justices of the Supreme Judicial Court of Massachusetts chose to redefine marriage in order to express moral approval of the sexual conduct of some adults. *Goodridge v. Dept. of Public Health*, 798 N.E.2d 941 (Mass. 2003); *Opinions of the Justices to the Senate*, 802 N.E.2d 565 (Mass.

2004). The purpose of marriage, the court asserted, is to promote "stable, exclusive relationships" between sexually-intimate adults. *Goodridge*, 798 N.E.2d at 969. For a majority of the Massachusetts high court, it was not enough for the Commonwealth to remove moral stigma from same-sex intimacy. Massachusetts marriage law could not stop short of extending to intimate same-sex couples the approbation that law accords to the unique achievement of marital monogamy. This prompted Justice Sosman to object to the "dogmatic tenor" of the majority's opinion. *Opinions of the Justices*, 802 N.E.2d at 579 n.5 (Sosman J., dissenting).

Strikingly, States that have eliminated the ancient, conjugal definition of marriage from law have not replaced it with any particular definition, or even a limiting principle. If marriage is not the union of a man and a woman, then what is it? If same-sex couples are married in some meaningful sense, then what sense is there in denying that same-sex trios, quartets, or larger groups are married? For that matter, why must marriage involve sex at all? Any person who loves and provides care for another person or group of persons has the same dignity as any other group of persons and deserves the same benefits that are offered to married couples. Without some new account of what marriage is, there is no reason in justice to deny the status of marriage to any group of people.

This leaves the incidents of marriage in a parlous position. Without any guiding or limiting principle—without any account of what marriage

is—States such as Massachusetts that have tried to eliminate the distinction between marriage and non-marriage, leave the incidents of marriage suspended arbitrarily in mid-air.

B. Alabama and States like it exercise their sovereignty to affirm marriage and the biological family that arises from it; this is a compelling state interest.

States have the power to distinguish between different forms of human sociability because States *must* be able to identify them and to distinguish them from each other. "'A legislature must have substantial latitude to establish classifications,' and therefore determining 'what is different and what is the same' ordinarily is a matter of legislative discretion." *Lewis v. Harris*, 908 A.2d 196, 222 (N.J. 2006), quoting *Plyler v. Doe*, 457 U.S. 202, 216 (1982). If States cannot use different terms to identify objectively-different relations and institutions, then the very possibility of lawmaking is in jeopardy. To eliminate from law the distinction between marital and non-marital relations is to leave the legal definition of marriage without any determinate meaning. It is to deprive the States of their ability to distinguish in law between relationships that are different in biological fact, and which have radically different consequences for state policy.

Words matter in law because they are the means by which laws communicate normative propositions, such as fundamental rights and duties. The word "marriage"

matters because it picks out a particular type of human sociability that has its own complex of goods that no other human relationship can fully replicate. Though same-sex relationships, caregiving relationships, and other groups of people contain some of the goods of marital friendship, none contains all of the goods of marriage. Marriage is *sui generis*.

Marital unions are inherently different from groups comprised of only one sex, and the distinctives of marriage are closely linked to the marital norms of fidelity and permanence, Sherif Girgis, *Windsor: Lochnerizing on Marriage?*, 64 Case Western Reserve Law Review, 971, 1001-04 (2014), to the legal and cultural bonds between children and their biological parents, *id.* at 992, 1007-13, and thereby, to the well-being of children and the States in which children live. This is the conception of marriage that Alabama and similar States have endorsed in their laws.

In order to exercise their constitutionally-retained powers, States must be able to distinguish between marriage and other relations that are like marriage in some ways but not in others. To leverage different forms of human sociability to serve public ends, States must have the authority to distinguish between different types of relationships by name. Adam J. MacLeod, *The Search for Moral Neutrality in Same-Sex Marriage Decisions*, 23 BYU Journal of Public Law 1, 54-58 (2008). Different forms of human sociability produce different goods. A marriage, a friendship, a business partnership, a tennis match, and a same-sex

friendship all have different natures and different implications for the common good of a society.

Only those States that reserve the name "marriage" for unions that are marital in fact are able to make clear the unique importance and fundamental rights and duties of the father-mother-child relationship. To force States to redefine marriage is to obscure the non-fungible value of mother and father and thereby, to deprive them and their people of their collective choices about how to structure society. If, as several inferior courts have concluded, it is not rational to believe that mother and father are each uniquely important, then it should not surprise us if people stop admitting that they believe that mother and father are important, or stop actually believing that mother and father are important, or stop encouraging each other to act as though mother and father are important. When marriage and birth certificates no longer designate "husband" and "wife," "father" and "mother," people might well internalize the message that the State does not consider those designations important.

The message that fathers and mothers are not uniquely important is already being communicated in Alabama, where some officials are obscuring the distinctions between fathers and mothers in order to satisfy the demands of a single United States District Court judge who declared Alabama's marriage laws irrational and unconstitutional in *Searcy v. Strange*. In response to that ruling, the Alabama Department of Public Health announced that it would eliminate from marriage and birth forms the designations of bride and

groom, father and mother.[3] The message is clear: If a marriage happens to involve a man and woman, if a child happens to have both a father and a mother, then that is none of the State's business. The State will not recognize or keep records of the distinctions between father and mother. By eliminating the categories of husband and wife, father and mother, from the annals of future state history, this agency is helping to ensure that children will no longer have the right to have both father and mother recognized by the State.

There are other costs of trying to eliminate gender-based marital distinctions from law. In its so-far unsuccessful attempt to make man-man and woman-woman relations equal to marriage, Massachusetts has forced Catholic Charities to stop placing children in adoptions.[4] A private, religious college that distinguishes between marriage and non-marriage has been threatened with loss of accreditation.[5] The Sisters

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[3] WSFA News, AL Health Dept. Updating Marriage Forms in Wake of Gay Marriage Ruling (February 5, 2015), available at http://www.wsfa.com/story/28034821/al-health-dept-updating-marriage-forms-in-wake-of-gay-marriage-ruling

[4] The Boston Globe, *Catholic Charities Stuns State, Ends Adoptions* (March 11, 2006), available at http://www.boston.com/news/local/articles/2006/03/11/catholic_charities_stuns_state_ends_adoptions/ (last visited January 30, 2015).

[5] The Boston Globe, *Accrediting Agency to Review Gordon College* (July 11, 2014), available at http://www.bostonglobe.com/metro/2014/07/11/agency-review-whether-gordon-college-antigay-stance-policies-violate-accrediting-standards/Cti63s3A4cEHLGMPRQ5NyJ/story.html (last

of St. Joseph of Boston, an order of nuns which operates a parochial school, has been forced to defend itself against a complaint filed at the Massachusetts Commission Against Discrimination for acting on its religious conviction that marriage is a man-woman union.[6] In these and other ways, witness to the reality of marriage is being excluded from public life.

On a complicated and controversial issue such as this, with no clear warrant in the Constitution for imposing one State's definition of marriage on another, the federal judiciary has a duty not to do so. As this Court stated last term, the people of the sovereign States have a "fundamental right" that is "held in common," the right "to speak and debate and learn and then, as a matter of political will, to act through a lawful electoral process." *Schuette v. Coal. to Defend Affirmative Action*, 134 S.Ct. 1623, 1637 (2014). And "[t]hat process is impeded, not advanced, by court decrees based on the proposition that the public cannot have the requisite repose to discuss certain issues. It is demeaning to the democratic process to presume that the voters are not capable of deciding an issue of this sensitivity on decent and rational grounds." *Id.*

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visited January 30, 2015).

[6] The Boston Globe, *Gay Married Man Says Catholic School Rescinded Job Offer* (January 30, 2014), available at http://www.bostonglobe.com/metro/2014/01/29/dorchester-man-files-discrimination-against-catholic-school-says-lost-job-because-was-gay-married/0KswVITMsOrruEbhsOsOeN/story.html (last visited January 30, 2015).

C. No morally-neutral reason, no constitutional doctrine, provides any basis to prefer the laws of Massachusetts to those of Alabama.

Because the dispute among the States concerns the nature of marriage, there is no morally-neutral ground upon which to decide which relationships should be called marriages. The Court should defer to the States' various resolutions of the question lest the Court overstep its role as a credible institution of law and judgment. The only way for this Court to remain neutral on this important and contentious public question is to affirm. *See* Matthew B. O'Brien, *Why Liberal Neutrality Prohibits Same-Sex Marriage: Rawls, Political Liberalism, and the Family*, 1 British Journal of American Legal Studies 411 (2012). To reverse the Sixth Circuit, this Court would act as an institution of moral preference and legislative will.

The disagreement among the States concerns the question what marriage *is*. That is a moral, not a legal question. There is no neutral ground of equal protection on which to decide in Petitioners' favor because this is not a dispute about who is permitted to marry. It is the structure and nature of the relationship, not the characteristics of any individual member of the couple, that makes a group marital (or not). Laws that distinguish between marriage and non-marriage, such as Alabama's, make "nothing hinge on orientation—real or imagined, assumed or avowed." Girgis, *Windsor:*

Lochnerizing on Marriage?, 64 Case Western Reserve Law Review, at 984-85.

Alabama's definition of marriage does not turn on motivations or sexual desires. It is structured to distinguish between marital and non-marital relationships. A man and a woman who are bisexual or same-sex attracted and who marry for convenience, or to have children, or to satisfy religious convictions, or for any other reason are married under Alabama law. Two heterosexual-oriented men (or two women) who seek a marriage license only to obtain marital privileges and benefits will be denied a marriage license under Alabama law, not because they are heterosexual but because they are both of the same gender. Three or more people of whatever sexual orientation will also be denied a marriage license. Alabama law draws lines on the basis of the structure of the relationship—conjugal union (marriage) or not (not a marriage)—and ignores the motivations and sexual proclivities of the parties to the union. Nor do Alabama's marriage laws draw a line with heterosexual relationships on one side and homosexual relationships on the other. Same-sex couplings are not the only relationships excluded from the definition of marriage. All non-marital relations are excluded.

Neither the Constitution nor any other law requires this Court to impose Alabama's conception of marriage on Massachusetts or vice versa. What the Petitioners seek "is not the protection of a deeply rooted right but the recognition of a very new right," with no ground in history, tradition, or the Constitution. *United States v.*

Windsor, 133 S.Ct. 2675, 2714-16 (2013) (Alito, J., dissenting). By asking this court to choose Massachusetts dogmas about marriage over Alabama law, Petitioners are "really seeking to have the Court resolve a debate between two competing views of marriage." *Windsor*, 133 S.Ct. at 2718 (Alito, J., dissenting).

The legitimacy of judicial rulings and the integrity of judicial decision-making rest entirely in the court's reasoning from law to judgment. "[A] court must discern not only the limits of its own authority, but also when to exercise forbearance, recognizing that the legitimacy of its decisions rests on reason, not power." *Lewis v. Harris*, 908 A.2d 196, 223 (N.J. 2006). A court that commands what a party prefers rather than what law requires promulgates a personal opinion. Those courts that have required States to redefine marriage have succumbed to the temptation of creating morally-contestable laws instead of interpreting law.

To force Massachusetts' incidents of marriage on States such as Michigan and Alabama would be arbitrary. If the purpose of marriage is only to promote stability in caring relationships, as the Massachusetts high court insisted in *Goodridge*, then neither marriage law nor the Constitution provides an objective, or even discernible, standard for determining who may, and who may not, require a State to call such relationships marriages. There can be no reason to deny the same marital privileges, or impose the same marital obligations, on other loving groups of people, whether couples or plural groups, whether sexually intimate or

not, and whether same-sex or mixed. Nor is there any reason to retain incest prohibitions and other incidents of marriage that presuppose real marriage. Where one can discern no "objective and workable standard" for choosing a benchmark by which to evaluate a specification of state law, there is no ground on which to challenge the State's chosen specification. *Holder v. Hall*, 512 U.S. 874, 881 (1994). Unless the Petitioners have a precise answer to the question what marriage is, and are able to articulate limiting principles for their new definition, they are asking this Court to create something out of nothing.

Perhaps, as some scholars have suggested, marriage will no longer be a unitary institution, valid (or not) for all purposes, but instead States will differentiate incidents for different marriage institutions. Larry Kramer, *Same-Sex Marriage, Conflict of Laws, and the Unconstitutional Public Policy Exception*, 106 Yale L.J. 1965, 1971 (1997); MacLeod, *The Search for Moral Neutrality*, 23 BYU J. Public Law at 54-58; William Baude, *Beyond DOMA: Choice of State Law in Federal Statutes*, 64 Stanford L. Rev. 1371, 1390 (2012). This Court can preserve its special authority as a neutral institution of judgment, and not will, by allowing the States to sort out the incidents of these new marriage institutions.

CONCLUSION

Amicus Curiae Governor Robert J. Bentley urges the Court to affirm the decision below of the U.S. Court of Appeals for the Sixth Circuit, and thereby overrule

the contrary decisions of the U.S. Courts of Appeals for the Fourth, Seventh, Ninth, and Tenth Circuits.

Respectfully submitted this 17th day of March, 2015.

Algert S. Agricola, Jr.*
**Counsel of Record*

OF COUNSEL:

RYALS, DONALDSON & AGRICOLA, P.C.
60 Commerce Street, Suite 1400
Montgomery, AL 36104
(334) 834-5290 P
(334) 834-5297 F
aagricola@rdafirm.com

David B. Byrne, Jr.
Legal Advisor to the Governor
OFFICE OF THE GOVERNOR
Alabama State Capitol
600 Dexter Avenue, Suite NB-05
Montgomery, AL 36130
(334) 242-7120 P
(334) 242-2335 F
david.byrne@governor.alabama.gov
pam.chesnutt@governor.alabama.gov

Adam J. MacLeod
5345 Atlanta Highway
Montgomery, AL 36109
(334) 386-7527
amacleod@faulkner.edu